SUPREME COURT
October
No. 313

GEORGE JOSEPH ORTTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MARKS, SHERMAN & LONDON
By Burton Marks
9720 Wilshire Boulevard
Beverly Hills, California 90212
(213) 278-1301

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969
No. _____

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MARKS, SHERMAN &
LONDON
By Burton Marks
9720 Wilshire Boulevard
Beverly Hills, California 90212
(213) 278-2301

Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI

Petitioner, George Joseph Orito, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 20, 1970.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix A to this petition. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The original judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on March 2, 1970. On April 20, 1970, the opinion of March 2, 1970, was withdrawn and the opinion of April 20 was substituted therefor. Another petition for rehearing, filed in accordance with Federal Rule of Appellate Procedure 40, was denied on May 26, 1970. On May 26, 1970, the Court of Appeals ordered that the issuance of the judgment of that court be stayed pending disposition by this Court of a petition for writ of certiorari. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED

1. Can a defendant, consistent with the Eighth Amendment and Federal Rule of Criminal Procedure 46, be compelled to

produce handwriting exemplars as a condition for the granting of bail?

2. Can the use of such exemplars be considered harmless because they were only used to show an attempt by the writer to disguise his handwriting?

3. Can petitioner be punished for simple transportation of obscene materials without violating the rights guaranteed him by the First Amendment, as explained by this Court in Stanley v. Georgia?

4. Was the seizure of a large amount of obscene materials, with a search warrant but without a prior adversary hearing, consistent with the First and Fourth Amendments to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment I:

> "Congress shall make no law/ abridging the freedom of speach . . ."

Federal Rule of Criminal Procedure 46:

> "(a) Right to Bail.
>
> "(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

". . . . .

"(c) Terms. If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.

"(d) Form, Conditions and Place of Deposit. A person required or permitted to give bail shall execute a bond for his appearance. The commissioner or court or judge or justice, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon his written agreement to appear at a specified time and place and upon such conditions as may be prescribed to insure his appearance. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

". . . . .

"(h) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his disposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody."

United States Code, Title 18:

Section 1462, Importation or Transportation of obscene matters.

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce --

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, pictures, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

"(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

"(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful --

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STATEMENT OF THE CASE

On July 10, 1968, a one count indictment was filed against petitioner, George Joseph Orito, charging a violation of Title 18, United States Code §1462. Petitioner plead not guilty. On March 3, 1969, after a court trial before the honorable Francis C. Whelan, petitioner was found guilty of "knowingly picking up and receiving from Trans World Airlines nine cartons containing photographs, booklets and films which were obscene . . . , in violation of Title 18, U. S. C. Section 1462" (C. T. 94).

Samples of this shipment were stipulated to be hard core pornography, as defined by this Court (R. T. 14). Petitioner denied only one element of the offense charged: knowledge of the obscenity of the materials he admitted having received. In an attempt to show the requisite knowledge on the part of petitioner, the prosecution introduced, inter alia, evidence tending to show that petitioner had sent a similar shipment from Baltimore to Los Angeles shortly before the shipment for which petitioner was indicted.

In order to show that petitioner sent the earlier shipment of obscene materials from Baltimore to Los Angeles, the handwriting on those packages (Exhibits 27, 28) was compared to other handwriting samples of petitioner. Among those other samples were

several which were demanded, over objection of petitioner (R. T. 84), as a condition for the granting of bail (Exhibits 41, 42, 43, 44; R. T. 86). Although the handwriting expert was unable to say whether the coerced exemplars were written by the same person that mailed the Baltimore to Los Angeles Shipment (R. T. 196), he did testify that the coerced exemplars were disguised or distorted (R. T. 214, 220).

The Baltimore to Los Angeles shipment was seized pursuant to a search warrant but without a prior adversary hearing and without anything more than the statement by the investigating officer that "[f]rom the description furnished me it is apparent that the contents of the shipment are in violation of Title 18, Section 1462 which prohibits the interstate transportation of obscene matter" (Affidavit for search warrant, Appendix C, infra).

There was no evidence showing that petitioner sold or advertised for sale any of the obscene materials.

REASONS FOR GRANTING THE WRIT

1. To Demand That a Defendant Supply Handwriting Exemplars as a Condition for Granting Bail Seriously Undermines the Guarantee of the Eighth Amendment and Solidly Contradicts Federal Rule of Criminal Procedure 46.

The Eighth Amendment provides that no "excessive" bail can be required of a defendant. While most cases involving the question of excessive bail deal with the amount of such bail, it seems clear that there may be conditions, other than the payment of money, which may be legitimately imposed, and which must therefore be considered in light of the Amendment.

This Court has held that the purpose of bail is to ensure the accused's presence at trial, and that therefore the fixing of the amount of bail "must be based upon standards relevant to the purpose of assuring the presence of that defendant" Stack v. Boyle, 342 U.S. 1, 5 (1951).

This same standard should be used to determine the "excessiveness" of other, non-financial conditions. Because of the increasing concern with the bail system, questions involving the type of non-financial conditions

which may be imposed are certain to arise with greater frequency. The Bail Reform Act of 1966, for example, fosters release of defendants on terms other than financial bond. See, e.g., Miller, The Bail Reform Act of 1966: Need for Reform in 1969, 19 Catholic U. L. Rev. 24 (1969).

This case presents a prime example of the type of condition which can not, consistant with the basic policy of the Eighth Amendment, be imposed. The trial court used the granting of bail as a coercive device to force petitioner to give evidence which would aid the prosecution in its attempt to convict him. The probability that the defendant would appear, if affected at all, could only have been lessened by the demand that he give such evidence.

Moreover, the court's demand that petitioner submit handwriting exemplars as a condition for bail is absolutely contrary to the mandatory language of Federal Rule of Criminal Procedure 46. The Rule states that "[a] person arrested for an offense not punishable by death shall be admitted to bail." It then provides that "[i]f the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the . . . court . . . will insure the presence of the defendant . . . ." (Emphasis added.)

The Court of Appeals, in its original opinion (Appendix B) reasoned that:

> "[the trial judge] might have held appellant in contempt, with no bail at all, for failure to comply. Under these circumstances, it would be absurd to hold that what the trial judge could do directly, he could not do conditionally."

Although the Court of Appeals later decided to retract this opinion in favor of a more limited ruling, it nevertheless seems appropriate to call attention to it for the purpose of demonstrating the misconceptions that both the trial court and the Court of Appeals harbor about the proper function of bail. The error in their views seems apparent from cases as old as Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and as recent as Davis v. Mississippi, 394 U.S. 721 (1969). The illegality of reaching ends by one means is not absolved by showing that there were other, legal means for achieving that same end.

2. To Allow the Wrongful Use of Such Evidence to be Labeled "Harmless" Because it was Used Only to "Impeach" the Defendant Can Not Be Reconciled With Either Harrington v. California or Chapmann v. California.

In its revised opinion the Court of Appeals said that "the expert who testified at the trial based his conclusion that appellant had prepared

the shipping labels solely on other samples of appellant's handwriting -- not on the exemplars produced pursuant to the court's order." It therefore concluded that no prejudice to petitioner was shown and did not officially decide whether the requirement of handwriting exemplars as a condition of bail was proper.

However, the exemplars were still used by the prosecution to convict petitioner. After the handwriting expert testified that certain other exemplars were the product of petitioner's hand, the prosecution still felt it necessary to examine the expert about the alleged attempt of petitioner to "disguise" the exemplars that were coerced from him. This testimony was clearly used against petitioner -- in much the same manner that a refusal to testify once was -- in order to "impeach" petitioner. The statement of the Court of Appeals is simply factually incorrect; petitioner was severely prejudiced by the use of the exemplars.

3. There Exist Significant Questions Regarding the Impact of Stanley v. Georgia on the Constitutionality of Title 18, U.S.C. §1462, and Other Similar Statutes. [1]

There exist several conflicting decisions of lower courts in the wake of this Court's decision in Stanley v. Georgia, 394 U.S. 557 (1969). Most recently, in United States v. Lethe, (Cr. S-884, E.D. Cal., April 29, 1970), it was held that Title 18, U.S.C. §1461, a companion statute to the one under which petitioner stands convicted, unconstitutionally infringed upon the First Amendment:

> "If the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his own home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them."

1/ Although this question was not properly raised and argued below, it is of such significance that it should, petitioner submits, be considered here. See Barr v. Mateo, 355 U.S. 171, 172 (1957); Duignian v. United States, 274 U.S. 195 (1926).

See also: United States v. Thirty-Seven Photographs, (C. D. Cal., Jan. 27, 1970) 38 L. W. 2440; Karalexis v. Byrne, (D. C. Mass., Nov. 28, 1969) 38 L. W. 2327, stay granted by this Court, 38 L. W. 3221.

4. This Case Presents Important Questions About the Proper Procedure for Securing a Warrant to Seize Quantities of Obscene Materials. [2/]

It is clear that the First Amendment poses problems respecting the seizure of obscene materials which are not encountered in the seizure of more conventional forms of contraband. Procedures "designed to focus searchingly on the question of obscenity" must be provided to avoid suppression of constitutionally protected publications or the interruption of their dissemination. Marcus v. Seach Warrant, 367 U.S. 717, 732 (1961);

2/ Although there were numerous objections to the use of materials in the trial court, this question was not clearly presented on appeal. Petitioner submits that it should be considered at this time because of its importance.

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968).

In A Quantity of Books v. Kansas, 378 U.S. 205 (1964), this Court held that the ex parte securing of the search warrant did not "focus searchingly on the question of obscenity" and that the seizure of the allegedly obscene material was unconstitutional since no adversary hearing upon the issue of obscenity was held prior to the seizure. That reasoning should apply regardless of who has temporary possession of the allegedly obscene materials. The government should be forced to at least attempt to locate the persons to whom the materials belong prior to the securing of a search warrant.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

MARKS, SHERMAN and LONDON

By Burton Marks

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,	)	
vs.	)	No. 24,255
GEORGE JOSEPH ORITO, Appellee.	)	

[April 20, 1970]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING, DUNIWAY and WRIGHT, Circuit Judges.

PER CURIAM:

Appellant was convicted by a court sitting without a jury of knowingly receiving obscene materials from a common carrier. 18 U.S.C. §1462. His counsel stipulated, and rightly, that the materials involved were not protected by the First Amendment.

Redrup v. New York, 386 U.S. 767 (1967); Ginzburg v. United States, 383 U.S. 463, 499 n. 3 (Stewart, J., dissenting).

Appellant defended on the ground that, though he had received the materials, he did not know that they were obscene. The Government presented evidence to show that, a week before the offense with which he was charged, appellant had prepared and mailed to himself a shipment of similar obscene materials. In addition, three prior misdemeanor convictions for possession of obscene materials were introduced. All this was admissible under the rule that prior similar acts, whether or not criminal, are admissible to show knowledge. Asher v. United States, 394 F. 2d 424 (9th Cir. 1968); Wright v. United States, 192 F. 2d 595 (9th Cir. 1951). There was sufficient evidence to support a finding of knowledge.

United States of America vs.

Appellant complains that the trial judge required the production of handwriting exemplars as a condition of bail. Whether this was proper, we do not decide. Cf. Gilbert v. California, 388 U.S. 263 (1967). But appellant cannot assert the error, if it was one, for as to him we think it clearly harmless. Chapman v. California, 386 U.S. 18 (1967).

The compelled exemplars were relevant only to determining whether the shipping labels on the prior shipment of obscene materials had been prepared by appellant. But the expert who testified at the trial based his conclusion that appellant had prepared the shipping labels sole on other samples of appellant's handwriting--not on the exemplars produced pursuant to the court's order. (R. T. 196). Hence no prejudice to appellant is shown.

It is a complete answer to defendant's claim of an unlawful search and seizure that none of the evidence so obtained, or its fruits, was introduced at trial.

Affirmed.

APPENDIX B

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant	)	
v.	)	No. 24,255
GEORGE JOSEPH ORITO, Appellee.	)	

Appeal from the United States District Court
for the Central District of California

Before: BROWNING, DUNIWAY and WRIGHT, Circuit Judges.

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It was not error to require appellant to give handwriting exemplars as a condition of bail. The Government had a right to compel their production. Gilbert v. California, 388 U.S. 263 (1967). A motion to that effect was granted by the trial judge. He might have held appellant in contempt, with no bail at all, for failure to comply. Under these circumstances, it would be absurd to hold that what the trial judge could do directly, he could not do conditionally. This is not a case of an unconstitutional condition. Compare Sherbert v. Verner, 374 U.S. 398, 404-06 (1963).

It is a complete answer to defendant's claim of an unlawful search and seizure that

none of the evidence so obtained, or its fruits, was introduced at trial.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

Commissioner's Docket No. 6
Case No. 131

United States of America	)	
	)	
v.	)	
	)	
The premises known as	)	
American Airlines Freight	)	AFFIDAVIT FOR
Terminal	)	SEARCH WARRANT
International Airport	)	
Los Angeles, California	)	

BEFORE RUSSELL R. HERMANN
Name of Commissioner

U. S. Court House
312 N. Spring Street
Address of Commissioner

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) American Airlines Freight Terminal International Airport

in the Central District of California there is now being concealed certain property, namely 7 cartons of obscene material

which is contraband material, the interstate transportation of which is illegal. This constitutes the means and instrumentalities of violating 18 USC §1462.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On May 24, 1968, Lyle Wink, American Airlines Freight Terminal, International Airport, Los Angeles, advised me that during the course of regular business a shipment had been received wherein a carton had been broken open. During the examination of the damage to the carton it was determined that this carton contained photographs which depict males and females participating in various acts of sexual relations. This carton is one of nine shipped from Baltimore, Maryland on the evening of May 22, 1968, and received at International Airport the same date, weighing 342 pounds. It was shipped on air freight bill "Baltimore 8595672," but only seven cartons have been located by Mr. Wink. From the description furnished me it is apparent

(Continued) on

/s/ W. James Wood
W. JAMES WOOD
Special Agent, FBI

Sworn to before me, and subscribed in my presence, May 24, 1968

TEOP:mao

/s/ Russell R. Hermann
United States Commissioner

that the contents of the shipment are in violation of Title 18, Section 1462 which prohibits the interstate transportation of obscene matter.

Mr. Wink advised that shipping papers indicate the shipper to be Joseph Klein, 3940 Litchfield Avenue, Baltimore, Maryland and they were addressed to M. Markham, Azusa, California, "Will Call".

I hereby attest and certify on Oct. 10, 1969, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

John A. Childress
Clerk, U. S. District Court
Central District of California

By /s/ Robt. J. Follin Deputy